



WISCONSIN SUPREME COURT
THURSDAY, JANUARY 6, 2005
10:45 a.m.

03-0106-CR State v. Scott R. Jensen
*Justices Jon P. Wilcox and David Prosser Jr. are not
participating in this case.*

*This is a review of a decision of the Wisconsin Court of Appeals, District IV
(headquartered in Madison), which affirmed a ruling of the Dane County Circuit Court,
Judge Daniel R. Moeser presiding.*

This case involves two state legislators (Representatives Scott R. Jensen, R-Waukesha, and Steven M. Foti, R-Oconomowoc) and a state employee (Sherry L. Schultz) who are accused of misusing public office to run political campaigns.

Here is the background: Jensen and Foti were the Republican leaders of the state Assembly in 2002 when these charges were filed. Jensen, who was first elected in 1992 and became Assembly speaker in 1997, faces three felony charges and a misdemeanor ethics violation; Foti, who was first elected in 1982, faces one felony count. Foti retired in 2004 and voters elected Oconomowoc Republican Joel Kleefisch, a former Foti aide, to the seat.

Jensen and Foti are accused of assigning dozens of employees, many of whom were hired to work for the Assembly Republican Caucus, an agency that was supposed to provide policy research to legislators, to work on election campaigns on state time. They also allegedly placed a full-time fundraiser for the Republicans (Sherry Schultz) on Foti's government payroll for two years at an annual salary of \$65,000.

Like Sen. Chuck Chvala, whose case is also on this morning's docket, Jensen and Foti assert that the language in the statute they are accused of violating is overly broad and unconstitutionally vague, and that a legislator trying to follow the law could be expected to be confused about the meaning of the term "duties" and whether there is a legal duty to refrain from hiring and directing employees to work on political campaigns:

Wis. Stat. § 946.12(3):

Any public officer ... who does any of the following is guilty of a Class I felony:

...

(3) Whether by act of commission or omission ... exercises a discretionary power in a manner inconsistent with the duties of the officer's office ... or the rights of others and with intent to obtain a dishonest advantage for the officer ... or another....

They argue that the duties of office that are referenced in this statute are enumerated not in the statutes but in the Assembly Rules. They argue that the Assembly, as part of a separate and equal branch of government, has the exclusive power to regulate, police, and discipline its members, and that the courts have no authority to step into legislative affairs and launch a prosecution based upon an alleged violation of the Assembly Rules. The State, on the other hand, argues that Jensen and Foti are not

accused of violating the Assembly Rules, but rather of committing the crime of misconduct in public office.

The State's investigation into alleged Capitol misdeeds spawned a related case that the state Supreme Court heard in November 2003.² That case questioned whether the Dane County district attorney's subpoena for the back-up computer tapes containing all electronic documents produced on the Legislature's 1,060 computers (e-mail, post-it notes, memos, drafts, revisions, and other communications) as of Dec. 15, 2001 was valid. The Court unanimously concluded that the subpoena was overbroad, and quashed it. Last month, the Court rejected a motion for reconsideration of that opinion, but did issue a clarification of its June holding.

In this current case, the Court will decide whether the prosecution against these two lawmakers may move forward.

² Custodian of Records for the Legislative Technology Services Bureau v. State of Wis. And Hon. Sarah B. O'Brien, 2004 WI 65